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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 18

STANDARD-VACUUM OIL COMPANY, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 59-64) is reported at 80 F. Supp. 657.

JURISDICTION

The judgment of the Court of Claims was entered on November 1, 1948 (R. 64). The petition for a writ of certiorari was filed on January 28, 1949, and granted on March 28, 1949. The jurisdiction of this Court rests upon 28 U. S. C. 1255(1).

QUESTION PRESENTED

Section 156 of the Judicial Code, 28 U. S. C. (1946 ed.) 262 bars, with enumerated exceptions not here material, every claim against the United States cognizable by the Court of Claims which is not

filed in that court within six years after the claim arises. In December 1941 and January 1942, the United States allegedly took certain properties of petitioner in the Philippine Islands for military purposes. On March 24, 1948, more than six years later, petitioner filed a petition in the Court of Claims to recover just compensation. In answer to the United States' motion to dismiss the claims as barred by limitation, petitioner alleged that, during the Japanese occupation of the Philippine Islands, which lasted until February 1945, it was deprived completely of access to information bearing on the existence of the claims. The question presented is whether the Court of Claims erred in granting the motion to dismiss, on the ground that Section 156 bars the claims.

STATUTE INVOLVED

Section 156 of the Judicial Code, 28 U. S. C. (1946 ed.) 262,[1] which is applicable to the present controversy, provided in pertinent part as follows:

> Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues. The claims of married women first accrued during marriage, of persons under the age of

[1] Now 28 U.S.C. 2501. Section 39 of the Act of June 25, 1948, c. 646, 62 Stat. 992, saves all rights or liabilities now existing under those statutes repealed by the revision of Title 28, United States Code.

twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court * * * within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

STATEMENT

On December 5, 1947, petitioner, a Delaware corporation, brought suit in the Court of Claims to recover just compensation for certain of its properties in the Philippine Islands, which the United States Armed Forces of the Far East (USAFFE), in December 1941 and January 1942, allegedly requisitioned for military purposes or destroyed to prevent capture by the military forces of Japan, with whom the United States was then at war (R. 1). On March 24, 1948, an amended petition was filed, and on June 1, 1948, a second amended petition was filed which set forth fifteen claims totalling $3,832,935.09, plus interest (R. 29). The amended petition eliminated nine of the claims stated in the original and added the two claims here involved, the Seventh (R. 15)[2] and the Fifteenth (R. 27-28), which amount to $263,132.85, plus interest. Neither the Seventh nor the Fifteenth

[2] Specifically, paragraphs 64 to 67, inclusive of the Seventh Claim.

claim arose out of the same transactions or occurrences as the other claims, which are not here involved.

On April 12, 1948, the United States moved to dismiss, as barred by limitation, the Fifth claim of the amended petition, that part of the Seventh claim which is stated in paragraphs 64 to 67, inclusive, of the amended petition, and the Fifteenth claim of the amended petition, or in the alternative, so much of the Fifteenth claim as relates to the alleged requisition of petroleum supplies (R. 58). By leave granted subsequent to the motion to dismiss, petitioner, on June 1, 1948, duly filed a second amended petition, from which it appeared that the Fifth claim accrued within six years prior to the filing of the petition (R. 1, 12-13). In answer to the motion to dismiss, petitioner asserted in a memorandum that, during the Japanese occupation of the Philippines, which lasted until February 1945, it was deprived completely of access to information on the existence of the claims.

Prior to the present litigation, at various times from January 16, 1946, to September 10, 1947 (R. 4-5, 7-8, 9, 12, 14, 16, 17, 19, 21, 22, 23, 25, 27), petitioner had sought administrative relief by filing with the United States Army Claims Service a proof of claim for each of thirteen of the fifteen claims stated in the second amended petition. Such proofs of claim had been filed with the Army Claims Service well within the six-year period of limita-

tions imposed by Section 156 of the Judicial Code, *supra,* p. 2, upon actions cognizable by the Court of Claims, and claims were subsequently seasonably filed below. However, no such proof of claim was filed with the Claims Service for the claims here involved, and admittedly, unless the running of the statute was suspended, they were not seasonably filed below.

The court below, one judge dissenting, in answering the question therein raised as to "whether the statute of limitations is suspended by reason of the fact that the plaintiff was unable to make complete and timely claims against the United States by reason of the occupation of the Philippine Islands by the military forces of the Japanese" (R. 60), noted the fact that proof of certain claims had been filed by petitioner with the United States Army Claims Service on May 3, 1946, and found, therefore, that "At that time, which was over a year and one-half prior to the six-year limitation, it would have been possible for the plaintiff to have filed with this Court proper claims which, even though they may not have been complete and accurate, could nevertheless have been amended as soon as the full facts concerning them came into possession of the plaintiff. The claims could have thus been preserved against the running of the statute of limitations. The language of Section 156 of the Judicial Code, *supra,* is clear and unambiguous * * *. In view of this language em-

ployed by Congress, and the circumstances of this case, we do not think that the running of the statute should be tolled as to the claims of the plaintiff * * *" (R. 62-63). Accordingly, the court below, on November 1, 1948, granted the United States' motion to dismiss (R. 64).

SUMMARY OF ARGUMENT

I

A. The unqualified language of Section 156 of the Judicial Code, *supra,* which limits the jurisdiction of the Court of Claims, precludes the tolling of the period of limitations by any disability not specifically enumerated therein. Familiar principles of statutory construction admonish against judicial expansion of the disabilities expressly set forth in the statute. "The general rule is that the language of the act must prevail, and no reason based on apparent inconvenience or hardship can justify a departure from it." *Amy* v. *Watertown,* 130 U. S. 320, 324. This principle has even greater force when applied to the statute in question, a statute which is not a mere limitation upon the remedy of petitioners but which goes to the jurisdiction of the court below. "Jurisdiction is not a matter of sympathy or favor. The courts are bound to take notice of the limits of their authority." *Reid* v. *United States,* 211 U. S. 529, 539. We submit that *Kendall* v. *United States,* 107 U. S. 123, where this Court refused to read an implied exception into the very act here involved, is controlling.

B. Petitioner, citing cases involving statutes of limitation governing litigation between private parties, asserts that, by implied exception, such statutes are tolled during war as to non-resident alien enemies, who have no standing to sue by operation of law. Hence, since petitioner claims it was unable to ascertain the existence of its claims through no fault of its own, because of war, petitioner argues that it should not be bound by a strict application of Section 156 of the Judicial Code, *supra*. Assuming that the rationale of the cases upon which petitioner relies could properly be applied to Section 156 of the Judicial Code, *supra*, despite its jurisdictional character, petitioner can not invoke the principle of these cases because its alleged disability to sue did not arise by operation of law.

Statutes of limitations are practical devices to spare the courts from litigation of stale claims and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. Although they usually come into play in situations where the plaintiff is guilty of negligence or laches, it does not follow that every supervening disability, not the fault of plaintiff, will raise an implied exception. The operation of the statute is suspended only where there is no possibility, as a matter of law, of maintaining suit. Inconvenience or hardship brought about by war or disruption of communications do not toll the statute as to non-resi-

dent alien enemies; a lack of capacity to sue by operation of law is required. The basis of petitioner's claim, however, is not that it lacked capacity to sue but that the factual consequences of war prevented it from instituting suit. Its claim clearly fell within that "inconvenience or hardship" which this Court has said cannot justify judicial amendment of a statute of limitations. *Amy* v. *Watertown*, 130 U. S. 320, 324. Examination of the alien enemy line of authorities reveals that that exception rests upon implications drawn from the impact of international law upon municipal law and upon an inference that the legislature did not intend to bar the claims of alien enemies. But no considerations based on international law are involved herein, and it can not be inferred that Congress did not intend to bar claims which did not fall within the enumerated exceptions. Furthermore, the alien enemy exception is based upon a denial of *access* to the courts. Here, petitioner does not assert, that it was, in fact, denied access to the courts and could not have instituted suit; its difficulty related to the trial and not to the timely filing of a claim. Cf. *McIver* v. *Ragan*, 2 Wheat. 25.

II

Assuming that the statute was suspended as to petitioner during the Japanese occupation of the Phillippine Islands, the claims are nevertheless barred. The act provides that the claims of those

under disability are not barred only if a claim is filed in the Court of Claims within three years after the disability has ceased. These claims were filed below more than three years after civil administration was restored in the Philippine Islands. The allegations contained in the petition filed below show that within that three year period petitioner was able to bring timely suit for claims amounting to $3,569,802.24. Failure to institute timely suit for the $263,132.85 here involved can be ascribed only to the oversight or laches of petitioner. Even if petitioner had not obtained complete information of its claims within that three year period, it could have filed a timely petition and subsequently amended it as soon as the full facts came into its possession.

ARGUMENT

I

The Six Year Period of Limitations Upon Suits Against the United States Was Not Suspended as to Petitioner During the Japanese Occupation of the Philippine Islands

Section 156 of the Judicial Code, 28 U.S.C. (1946 ed.) 262, bars every claim against the United States cognizable by the Court of Claims which is not filed in that court within six years after the claim first accrues. Provision is made therein for the tolling of the statute as to certain enumerated disabilities which, in clear language, are made the exclusive exceptions. Admittedly, petitioner's claims here involved were not seasonably filed and petitioner

does not come within any of the express, exclusive statutory exceptions. Petitioner asserts, however, that it was unable to file suit in the Court of Claims until it could ascertain the nature and extent of its claims, and that such claims could not be so determined during the Japanese occupation of the Philippine Islands. Petitioner contends, in essence, that, although this alleged disability does not come within the language of the statute, nevertheless the statute should be judicially construed so as to engraft an additional disability not specified by Congress. We submit that if the statute of limitations is to be amended for petitioner's purposes, such amendment can be made only by Congress.

A. *The plain language of Section 156 of the Judicial Code, which limits the jurisdiction of the Court of Claims, precludes the tolling of the statute by any disability not specifically enumerated therein.*

The language of the act is plain and unequivocal. After specifying the excepted disabilities, the act declares that "no other disability than those enumerated shall prevent any claim from being barred." It is difficult to conceive of other phraseology by which Congress could have made its intention any clearer. "Where the words are plain there is no room for construction." *Osaka Shosen Line v. United States,* 300 U. S. 98, 101, and cases there cited. In the absence of any legislative history

evidencing a contrary interpretation, and since a literal application of the Act does not lead to absurd and outlandish consequences, there can be no justification, under the guise of construction, for engrafting upon the act an additional disability not specified by Congress. *Id.* at 101.

It is an established rule of construction that the enumeration by the legislature of specific exceptions to a statute of limitations excludes all others. See 1 Wood, *Limitations* (4th ed. 1916), p. 55; 3 Sutherland, *Statutory Construction* (3d ed. 1943), p. 388. "The general rule is that the language of the act must prevail, and no reason based on apparent inconvenience or hardship can justify a departure from it." *Amy* v. *Watertown,* 130 U. S. 320, 324; *Kendall* v. *United States,* 107 U. S. 123, 125; *McIver* v. *Ragan,* 2 Wheat. 25, 29; *Musgrove* v. *McManus,* 24 N.M. 227, 232; *Powell* v. *Koehler,* 52 Ohio 103, 118-119.

This principle has even greater force when applied to the statute in question, a statute which does not merely impose a limitation upon the remedy of petitioners, but which also establishes a limitation on the jurisdiction of the court below. *Finn* v. *United States,* 123 U. S. 227; *United States* v. *Wardwell,* 172 U. S. 48. In this regard, this Court has declared that "suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed." *Munro* v. *United States,* 303 U. S. 36, 41.

"Jurisdiction is not a matter of sympathy or favor. The courts are bound to take notice of the limits of their authority." *Reid* v. *United States,* 211 U. S. 529, 539. Since petitioner does not fall within any of the enumerated exceptions in Section 156 of the Judicial Code, *supra,* the judiciary should not insert into the statute an exception which it does not contain and thereby unauthorizedly add to the limited jurisdiction which Congress has given to the court below.

In *Kendall* v. *United States,* 107 U. S. 123, this Court followed the principles of construction referred to above and refused to depart from the plain language of the act. We believe the *Kendall* case, which was decided soon after the passage of the Act, is controlling here. In that case, the claim of Kendall, who had engaged in the service of the Confederate Government, arose in December 1865. Since a claimant, if a citizen, must have at all times borne true allegiance to the Government of the United States (28 U.S.C. (1946 ed.) 265), Kendall had no standing to sue. By virtue of the amnesty proclamation of December 25, 1868, however, his disabilities were removed, and his rights, privileges, and immunities under the Constitution, restored. On November 22, 1872, less than six years after the amnesty proclamation but more than six years after his claim accrued, Kendall filed his petition. This Court refused to exclude from computation,

n the issue of limitation, the time during which he vas unable to sue. The opinion stated (*id.* at 125):

> We said in *McElrath* v. *United States,* 102 U. S. 426, that the government could not be sued except with its consent, and that it may restrict the jurisdiction of the Court of Claims to certain classes of demands. The acts in question do contain restrictions which that court may not disregard. For instance, where it appears in the case that the claim is not one for which, consistently with the statute, a judgment can be given against the United States, it is the duty of the court to raise the question whether it is done by plea or not. To that class may be referred claims which are declared barred if not asserted within the time limited by the statute. What claims are thus barred? The express words of the statute leave no room for contention. *Every* claim—except those specially enumerated—is forever barred unless asserted within six years from the time it first accrued. And that there might be no misapprehension as to the intention of Congress, the statute, after enumerating the cases to which the limitation of six years should not apply, declares that "no other disability than those enumerated shall prevent any claim from being disbarred." The court cannot superadd to those enumerated, a disability arising from the claimant's inability to truthfully take the required oath. It has no more authority to engraft that disability upon the statute than a disability arising from sickness,

surprise, or inevitable accident, which might prevent a claimant from suing within the time prescribed. * * *

We submit, therefore, that petitioner's contentions are authoritatively rejected by the *Kendall* decision. The issue is one of jurisdiction and the language of the act is clear and definite. "The court cannot superadd to those [disabilities] enumerated." *Kendall* v. *United States, supra,* at 125; cf. *Green* v. *United States,* 17 C. Cls. 174.

B. *Petitioner does not come within any implied exception to statutes of limitations affecting private litigation.*

Petitioner, citing cases involving statutes of limitations applicable to litigation between private parties, contends that it is now well established that grounds other than those specified in the statute may have the effect of suspending the running of the period of limitations. Reliance is placed upon a line of cases beginning with *Hanger* v. *Abbott,* 6 Wall. 532, which hold that war tolls the running of the statute as between citizens of different belligerent nations. It is asserted that this exception is based upon principles of justice and fairness which are equally applicable here. The argument is that, since petitioner allegedly was unable to ascertain the existence of its claims through no fault of its own, it should not be bound, in the circumstances, by a strict application of the statute.

Assuming *arguendo* that the rationale of the cases relied upon by petitioner could be applied to the jurisdictional act involved here, it seems clear that petitioner's cause does not fall within that rationale.

1. At the outset, it is important to consider the nature and object of the usual statute of limitations. Its purpose is not to punish the plaintiff but "to quiet titles, to suppress fraud, and to supply the deficiency of proofs arising from the ambiguity and obscurity or antiquity of transactions. * * * they take away all solid ground of complaint, because they rest on the negligence or *laches* of the party himself." *Hanger* v. *Abbott,* 6 Wall. 532, 538. It would seem, therefore, that if the disability to sue results through no fault of the plaintiff, it is unjust to bar the claim. Nevertheless, the decisive consideration is that it is the legislature and not the courts which must determine whether an exception is to be made—it is the function of the legislature to choose those classes of disabilities which it will except, and it can, if it deems proper, require the disability to exist at the time the cause of action arises, and not to allow the disabilities to operate cumulatively.[3]

[3] "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers*

Recognizing the plenary power of the legislature in this regard, the courts, in adding an exception of limited application to those enumerated in a statute, have inferred that the legislature would have intended such exception had the issue been brought to its attention. Cf. *Hanger* v. *Abbott*, 6 Wall. 532, 539; *Wall* v. *Robson*, 2 Nott & McCord [S. C.] 498, 506-508. It has been presumed that the legislature would not have intended to bar claims where the plaintiff was denied access to the courts.[4] That condition may come about when a state of war suspends the right of non-resident alien enemies to institute suit (*Hanger* v. *Abbott*, 6 Wall. 532; *The Protector*, 9 Wall. 687; *Levy* v. *Stewart*, 11 Wall. 244; *Brown* v. *Hiatts*, 15 Wall. 177; *Borovitz* v. *American Hard Rubber Co.*, 287 Fed. 368 (N. D. Ohio); *Farenholtz* v. *Meinshausen*, 181 App. Div. 474; *Siplyak* v. *Davis*, 276 Pa. 49; *Wall* v. *Robson*, 2 Nott & McCord [S. C.] 498),

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v. *Railway Express Agency*, 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what is now called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314.

[4] Although infants, idiots, and insane persons have no capacity to sue, they are not denied access to the courts. Suit may be brought in their behalf by a next friend or guardian.

when the courts of justice are closed because of civil unrest (*Adger* v. *Alston*, 15 Wall. 555; *Batesville Institute* v. *Kauffman*, 18 Wall. 151; *Ross* v. *Jones*, 22 Wall. 576),[5] or when a statute prevents the filing of suit prior to an administrative determination (*Braun* v. *Sauerwein*, 10 Wall. 218).

It is within this exception that petitioner attempts to bring itself by asserting that it was unable to file suit until it could ascertain the nature of its claims, which could not be determined during the Japanese occupation of the Philippine Islands. Petitioner urges that the statute of limitations cannot run when the vicissitudes of war impose insurmountable difficulties for which petitioner is in no way responsible. At first blush, petitioner's argument seems to come within the rationale of the cases cited above. It may appear harsh to bar a plaintiff when he has been impeded from filing suit by a supervening disability, not his own fault. But as we have already noted, equitable considerations do not curb the legislature's power to make only such exceptions as it sees fit. And, as this Court has pointed out, not every supervening disability, not the fault of the plaintiff, is sufficient to raise an implied exception to the statute of limitations. *Amy* v. *Watertown*, 130 U. S. 320.

In *Amy* v. *Watertown*, *supra*, at 323-324, Mr. Justice Bradley, in limiting the prior overbroad

[5] See also, Gregory, *The Effect of War On the Operation of Statutes of Limitations*, 28 Harv. L. Rev. 673.

generalization drawn from *Hanger* v. *Abbott, supra,* observed "It is said by Mr. Justice Strong in *Braun* v. *Sauerwein,* 10 Wall. 218, 223, 'It seems, therefore, to be established, that the running of a statute of limitations may be suspended by causes not mentioned in the statute itself.' The observation is undoubtedly correct; but the cases in which it applies are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it."

Continuing, Mr. Justice Bradley declared (*id.* at 325-326):

> There is one class of cases which is excluded from the operation of the statute by *act of law* itself, of which the case in which Mr. Justice Strong made the remark referred to is one. This class embraces those cases in which no action can be brought at all, either for want of parties capable of suing, or *because the law prohibits the bringing of an action.* * * * So where a citizen of one country has a cause of action against a person who resides in another country at war with his own, the *law of nations* forbids any intercourse between them, and suspends all suits and actions by the one against the other: and, therefore, the time, during which the right to sue is thus suspended, is not reckoned as any part of the time given by the statute of limitations for bringing an action. [citations] *Besides this general exception created by act of law, it is difficult to find any other ground or cause for suspending the*

operation of the statute not specified in the act itself. [emphasis added]

We submit that petitioner does not come within the *Hanger* v. *Abbott* exception. As pointed out in Part I A, *supra,* p. 11, "the general rule is that the language of the act must prevail, and no reason based on apparent inconvenience or hardship can justify a departure from it". *Amy* v. *Watertown,* 130 U. S. 320, 324. "Unless the difficulty of bringing an action in a particular case can be brought within the general principle that the statute will not begin to run where no *legal* possibility of maintaining an action exists even though a theoretical right of action has accrued, or within one of the disabilities expressly enumerated by the statute, the general rule is clear that the statute will begin to run, and its operation will not be suspended by other disabilities." [emphasis supplied] 6 Williston, *Contracts* (Rev. ed. 1936) § 2011.

The alien enemy exception is in accord with this principle. As pointed out by Mr. Justice Bradley, *supra,* that exception arises as a result of an "act of law." Traditionally, a state of war suspends limitation periods as to non-resident alien enemies by its mere existence, without the necessity or relevancy of looking into issues of fact as to whether or not it actually prevented legal proceedings. It is not the inconvenience or hardship brought about by war, the disruption of communications, which

tolls the statute, but the denial of a judicial remedy by "act of law."[6]

Here, however, the alleged disability with which petitioner was burdened is a factual disability, not a legal disability. It is not contended that there was no forum available to petitioner or that petitioner had no capacity to sue. The basis of petitioner's argument is that the factual consequences of war prevented petitioner from instituting suit. Assuming this to be true, such factual disability does not call for the suspension of the statute of limitations.[7] As such it is merely that "incon-

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[6] State Workmen's Compensation Act cases arising after World War I demonstrate that the question is one of legal, not factual, disability. Despite the fact that hostilities were terminated and lines of communication reestablished, limitations were tolled as to aliens residing in belligerent countries until the signing of the treaty of peace. *Colorado Fuel & Iron Co.* v. *Industrial Commission*, 73 Colo. 579; *Inland Steel* v. *Jelenovic*, 84 Ind. App. 373; *Industrial Commission* v. *Rotar*, 124 Ohio 418; *Garvin* v. *Diamond Coal & Coke Co.*, 278 Pa. 469. On the other hand, the delineation of new national boundaries and the creation of new States converted many alien enemies into alien friends. In those cases, the statute began to run when the enemy status ceased. *Sadowski* v. *Hubbard Steel Foundry Co.*, 100 Ind. App. 233; *Kolundjija* v. *Hanna Ore Mining Co.*, 155 Minn. 176; *Lipmanowich* v. *Crookston Lumber Co.*, 168 Minn. 332. [Disability to sue as an alien enemy depends upon residence and not upon citizenship. See *Ex parte Kawato*, 317 U.S. 69; *Wirtele* v. *Grand Lodge, A.O.U.W.*, 111 Neb. 302 (citizen of United States resident in Germany during World War I); 2 Hyde, *International Law* (1922 ed.) § 611; 27 Yale L.J. 104-108.] Similarly, where the alien resided in an allied country, the statute was not suspended. *Poccardi* v. *Ott*, 83 W. Va. 166; see *Siplyak* v. *Davis*, 276 Pa. 49, 58.

[7] *Osbourne* v. *United States*, 164 F. 2d 767 (C.A. 2), is contra to the above analysis. In that case, libelant was a sailor who had been injured through the negligence of the libelees in late 1941. Having been interned by the Japanese from Decem-

venience or hardship" which this Court has said cannot justify a departure from the statute. *Amy* v. *Watertown, supra,* at 324.[8]

2. Examination of the reasoning of the courts in articulating the alien enemy exception shows clearly that none of the considerations upon which that exception rests is present before this Court. These considerations are fully developed in the opinion of this Court in *Hanger* v. *Abbott,* 6 Wall. 532, and in the opinion of the Constitutional Court of South Carolina in *Wall* v. *Robson,* 2 Nott & McCord [S. C.] 498. In *Hanger* v. *Abbott, supra,* Abbott of New Hampshire sued Hanger of Arkansas in assumpsit. The question was whether the period of the Civil War was to be excluded from the computation of time fixed by the Arkansas Statute of Limi-

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ber 8, 1941, to October 1945, he was unable to comply with the jurisdictional period of limitations of either the Suits in Admiralty Act, 46 U.S.C. 745, or the Jones Act, 46 U.S.C. 688, 45 U.S.C. 56. The Court of Appeals held that the period of limitations was suspended during his imprisonment. For the reasons set forth in Part I A of this brief, we believe this decision to be in error. However, we submit that the *Osbourne* case is not, in any event, authority for petitioner's position. See *infra,* pp. 26-29.

[8] It should be pointed out that petitioner's argument that it would be an incredibly harsh and unconscionable rule that denied petitioner the right to sue and extended that right to a Japanese citizen, as an enemy alien, is without merit in this case. Section 155 of the Judicial Code, 28 U.S.C. (1946 ed.) 261, now 28 U.S.C. 2502, provides that only "aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims * * *." Petitioner, who has the burden of proof herein, has made no showing that the Japanese Government permits suits against itself in its courts by citizens of the United States. Thus, whatever the equities of petitioner's

tations (copied from 21 Jac. I, c. 16), there being no exception by the terms of the statute for such case. In *Wall* v. *Robson, supra,* Robson, a British subject, sued Wall, an American citizen residing in South Carolina, on a bill of exchange. The question was whether the period of the War of 1812 was to be excluded from the South Carolina Statute of Limitations of 1712, there being no exception by the terms of the statute for such case.

First, the opinions point out that war imports a prohibition of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country. Trading with the enemy subjects the property to confiscation, or to capture and condemnation. "In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist, but it may well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times. Better opinion is that executed contracts, such as the debt in this case, although existing prior to the war, are not annulled or extin-

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argument may be in a suit between individuals, they are irrelevant here.

It should also be noted in this connection that Sections 102(b) and 103 of the Philippine Rehabilitation Act of 1946, 60 Stat. 128, 50 U.S.C. Appendix 1752(b), 1753, provide that compensation thereunder shall not be made to enemy aliens. Similarly, Section 1 of the Foreign Claims Act, as amended, 57 Stat. 66, 31 U.S.C. 224d, precludes payment to "any national of a country at war with the United States * * * except as the Commission or the local military commander shall determine that the claimant is friendly to the United States."

guished, but the remedy is only suspended, which is a necessary conclusion, on account of the inability of an alien enemy to sue * * *." *Hanger* v. *Abbott, supra,* at 536. "And the reason given for not permitting an alien enemy in time of war, is a good one, as it might have a tendency to draw the resources out of the country, and the better enable or aid the opposite party to carry on the war on his part." *Wall* v. *Robson, supra,* at 503.

Accordingly, if "Absolute suspension of the right, and prohibition to exercise it, exist during war by the law of nations, * * * then it is clear that peace cannot bring with it the remedy if the war is of much duration, unless it also be held that the operation of the statute of limitation is also suspended during the period the creditor is prohibited, by the existence of the war and the law of nations, from enforcing his claim. Neither laches nor fraud can be imputed in such a case, and none of the reasons on which the statute is founded can possibly apply, as the disability to sue becomes absolute by the declaration of war, and is a conclusion of law." *Hanger* v. *Abbott, supra,* at 539-540. "A contrary doctrine would enable every debtor in a country lately restored to peace, where there had been commercial dealings before the war, to cheat and defraud his just and *bona fide* creditors." *Wall* v. *Robson, supra,* at 503; see also, *Hanger* v. *Abbott, supra,* at 542.

Finally, the opinions state that it could not have been within the contemplation of the legislatures

concerned to bar suit by alien enemies on account of limitation. "Cases where the courts of justice are closed in consequence of insurrection or rebellion are not within the express terms of any such exception, but the statute of limitations was passed in 1623, more than a century before it came to be understood that debts due to alien enemies were not subject to confiscation. * * * Regarding such debts as annulled by war, the law-makers of that day never thought of making provision for the collection of the same on the restoration of peace between the belligerents." *Hanger* v. *Abbott, supra,* at 539; see also, *Wall* v. *Robson, supra,* at 507-508.

In summary, the courts held: The law of nations denies access to the courts to alien enemies during a war;[9] therefore, the law of nations suspends the operation of the usual municipal statute of limitations.[10] In connection with such statutes, the courts

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[9] The correctness of this statement is open to question. In the civil law, anyone, even an alien enemy, who can get to the courts may prosecute or defend his rights, with the same privileges and under the same duties as in time of peace. See Thayer, Schoch, Ireland, *The Effect of a State of War Upon Statutes of Limitation or Prescription,* 17 Tulane L. Rev. 416-446.

[10] "* * * If then it is clear and evident both by the common law and the law or courtesy of nations, that there is no national principle existing to bar or prevent an alien in a foreign country from recovering a just debt after the restoration of peace, shall it be said or allowed, that any municipal regulation of one of the states shall have that effect, where the general law of nations and those of foreign commerce say the contrary? I very much question the power or authority of any state or nation, at this enlightened period of the world, to pass such a law, if they were disposed to do such an act of injustice." *Wall* v. *Robson, supra,* at 503-504.

Treaties of peace sometimes specifically provide for the

inferred that the legislature did not intend to bar the claims of alien enemies.

Neither of these considerations is present here. The impact of the law of nations upon municipal law—a decisive factor in *Hanger* v. *Abbott, supra,* and *Wall* v. *Robson, supra*—does not enter into this case. Petitioner is not a foreign corporation but a Delaware corporation; the disability is factual, not legal. Nor can it be inferred in connection with the statute here involved that Congress did not intend to bar all claims which did not fall within the enumerated exceptions in Section 156.

The observation of Mr. Justice Clifford in *Hanger* v. *Abbott, supra,* at 539, that the lawmakers of 1623 never thought of suspending the period of limitations because debts due to alien enemies were subject to confiscation, is not apposite to the Congress which, during the Civil War, by the Act of March 3, 1863, 12 Stat. 765, 767, enacted the statute in issue (28 U.S.C. (1946 ed.) 262). This is demonstrated by the enactment, a year later, of the Act of June 11, 1864, 13 Stat. 123, which suspended statutes of limitations for that time during which a defendant was beyond the service of process because of the Civil War. Also pertinent is the Abandoned Property Act of March 12, 1863, 12 Stat. 820, which enabled those persons resident in

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retroactive suspension of the operation of statutes of limitation during the war period. See *Hopkirk* v. *Bell,* 3 Cranch 454; *Ogden* v. *Blackledge,* 2 Cranch 272; cf. Article 300(a) of the Treaty of Versailles, June 28, 1919 [Carnegie Endowment for International Peace, *The Treaties of Peace* 1919-1923, Vol. 1, p. 190].

the insurrectionary states but loyal to the Union to bring suit in the Court of Claims "within two years after the suppression of the rebellion" to recover for property taken by the United States. Although the Act's purpose was to create a right of action in those otherwise considered as public enemies,[11] insofar as it adopts a period of limitations other than the six-year provision in Section 156, it indicates a legislative awareness of the hardships of war. That Congress nevertheless did not provide for other claims against the United States which might be barred by limitation during the Civil War is, we believe, significant. The enumerated disabilities having been made exclusive, it is a necessary inference that Congress intended no exceptions. Cf. *Nathan* v. *Equitable Trust Co.*, 250 N. Y. 250, reargument denied, 250 N. Y. 612.

3. There is a further and equally fundamental objection to petitioner's reliance on the *Hanger* v. *Abbott* line of authorities. In those cases, as the court below points out (R. 62), plaintiff was denied access to the courts.[12] Here, the courts of the United States were open during the time in ques-

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[11] See *United States* v. *Anderson*, 9 Wall. 56, 65.

[12] The same rationale—denial of access to courts—was the basis for the suspension of the statute in *Osbourne* v. *United States*, 164 F. 2d 767 (C.A. 2), discussed in footnote 7, *supra*, pp. 20-21. The Court of Appeals reasoned that "All statutes of limitation are based on the assumption that one with a good cause of action will not delay bringing it for an unreasonable period of time; but, *when a plaintiff has been denied access to the courts, the basis of the assumption has been destroyed.*" [emphasis added] *Id.* at 769.

tion, and petitioner had standing to sue.[13] "The difficulties under which the plaintiffs labored, respected the trial, not the institution of their suit." *McIver* v. *Ragan*, 2 Wheat. 25, 29.

The case of *McIver* v. *Ragan, supra*, cited in *Hanger* v. *Abbott, supra*, at 542, would also appear controlling here. Plaintiffs there sued in ejectment, and defendants pleaded, as a bar, possession for seven years. No corner of the grant under which plaintiffs claimed was marked except the beginning corner, and that corner, and all others but one, was within the Indian boundary. Although the land in possession of defendants did not lie within Indian territory, since the laws of the United States prohibited all persons from surveying Indian lands, plaintiffs were unable to survey their land and prove defendants within their grant until the Indian lands were ceded to the United States. Nevertheless, Mr. Chief Justice Marshall refused to except plaintiffs from the operation of the stat-

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[13] A pertinent inquiry is whether a forum is available. As between citizens of the confederate states, it was held that statutes of limitations were not suspended during the Civil War where the state courts were open. *Lockhart* v. *Horn*, Fed. Cas. No. 8445 (C.C.S.D. Ala.), affirmed, 17 Wall. 570; *Cross* v. *Sabin*, 13 Fed. 308 (C.C.E.D. Tenn.); cf. *Smith* v. *The Charter Oak Life Ins. Co.*, 64 Mo. 330. However, since the federal courts located in the insurrectionary states were closed during the war, the statutes were held not to be a bar to suit in the federal courts after the war. *Adger* v. *Alston*, 15 Wall. 555; *Batesville Institute* v. *Kauffman*, 18 Wall. 151; *Ross* v. *Jones*, 22 Wall. 576.

ute of limitations, reasoning as follows (2 Wheat. at 29-30):

> Wherever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It *would be going far, for this court to add to those exceptions. It is admitted, that the case of the plaintiffs is not within them, but it is contended to be within the same equity with those which have been taken out of the statute; as where the courts of a country are closed, so that no suits can be instituted. This proposition cannot be admitted. The difficulties under which the plaintiffs labored, respected the trial, not the institution of their suit.* There was no obstruction to the bringing of this ejectment at an earlier day. If at the trial, a survey had been found indispensable to the justice of the cause, the sound discretion of the court would have been exercised, on a motion for continuance. Had such motion been overruled, the plaintiffs would have been in the condition of all those who, from causes which they cannot control, are unable to obtain that testimony which will establish their rights. If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations, an exception which the statute does not contain. It has never been determined, that the impossibility of bringing a case to a successful issue, from causes of uncertain duration, though cre-

ated by the legislature, shall take such case out of the operation of the act of limitations, unless the legislature shall so declare its will. [Emphasis added]

We see no basis for distinguishing the two cases. In *McIver* v. *Ragan*, as is here alleged, plaintiff was completely without information as to the existence of the cause of action. Moreover, in that case, plaintiff's ignorance was caused by operation of federal statute. We submit, therefore, that Mr. Chief Justice Marshall's rationale is equally compelling here.

II

By the Terms of Section 156 of the Judicial Code, the Claims of Petitioner Are Barred Because Suit Was Not Filed Within Three Years After the Disability Ceased

Assuming *arguendo* that petitioner was under a disability which gives rise to an implied exception to Section 156 of the Judicial Code, 28 U.S.C. (1946 ed.) 262, petitioner's claims are nevertheless barred. The act provides that the claims of those under the enumerated disabilities shall not be barred if the petition be filed in the Court of Claims "within three years after the disability has ceased." If petitioner is to be excepted from the statute by reason of a disability not enumerated, that disability should stand on no better footing than those disabilities expressly provided for by Congress. The considerations advanced in Part I, *supra*, pp. 10-14, would, if nothing else, call for such equal treatment.

The claims here involved were filed in the court below on March 24, 1948, more than three years after the restoration of civil administration in the Philippine Islands on February 27, 1945.[14] Not all of the Philippines were liberated by February of 1945, and, of course, petitioner was not at once able to gather complete information as to the existence of its claims. However, at that time, petitioner was no longer *completely* denied access to information. Since petitioner's contention is that the *complete* deprivation of access to information suspends the running of the statute, we submit that the disability, if any, terminated in February of 1945.

We believe that the allegations contained in the petition filed below demonstrate that, at the least, petitioner could have filed timely claims which could have been later amended when further information was obtained. At various times from January 16, 1946, to September 10, 1947 (R. 4-5, 7-8, 9, 12, 14, 16, 17, 19, 21, 22, 23, 25, 27), petitioner sought administrative relief by filing with the United States Army Claims Service, a proof of claim for each of thirteen of the fifteen claims stated in the second amended petition. Such proofs of claim were filed with the Claims Service well within the six-year limitation imposed by Section 156 of the Judicial Code upon actions cognizable in

[14] See Official Gazette of the Republic of the Philippines, vol. 41, No. 1, April 1945, p. 86; New York Times, February 27, 1945, p. 1, col. 2.

the Court of Claims, and claims were subsequently seasonably filed below in the petition of December 5, 1947. No such proof of claim was filed with the Claims Service for the two claims here involved. There is no indication in the record that the remaining two claims were so different in character that no information at all about them could have been obtained in the three years remaining after February 1945. Failure to obtain that data can be ascribed, therefore, only to the oversight or laches of petitioner.[15] As the court below states (R. 62), "it would have been possible for the plaintiff to have filed with this Court proper claims which even, though they may not have been complete and accurate, could nevertheless have been amended as soon as the full facts concerning them came into possession of the plaintiff."

Apart from the three-year provision of the act itself, we believe that petitioner was afforded a reasonable time after February 1945 in which to bring suit. The United States would seem entitled to reasonable notice of purported claims before the deficiency of proofs arising from ancient transactions is made irreparable. We submit, therefore, that regardless of whether petitioner's alleged disability tolled the statute during the Japanese occupation of the Philippine Islands, the claims here involved are barred.

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[15] The thirteen claims which were filed in time amount to $3,569,802.24, plus interest; the two remaining claims total $263,132.85, plus interest.

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.[16]

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[16] If the judgment be reversed on the record before this Court, the cause should be remanded with directions to the court below to overrule the motion to dismiss without prejudice, to order petitioner to amend its pleadings to include the allegations of fact contained in the memoranda as to petitioner's disability to sue, to order trial of such facts, and to make such findings as are necessary, in accordance with the conclusions of law of this Court, for the final disposition of the motion to dismiss.

The Brief for the United States herein is premised on the assumption that petitioner, in fact, suffered from a supervening disability, not its own fault. There is nothing in the record to support that assumption. The various petitions filed in the Court of Claims contain no allegation that petitioner was deprived of access to information bearing on the existence of its claims. Nor did petitioner amend its petition to show such facts after the United States moved to dismiss the claims here involved as barred by limitation. Instead, in its unverified memoranda in answer to the motion, petitioner alleged that as an expectable concomitant of war all local records and files were either destroyed, lost or taken by the invading forces. Petitioner did not allege that it possessed no records in the United States of its property in the Philippine Islands. Petitioner further asserted that the only persons who would have had sufficient knowledge of the claims, in the absence of documentary material, were employees of petitioner at the various installations in the Islands, and urged the court below to take judicial notice that these employees were either killed by the invading forces or placed in concentration camps during the Japanese occupation.

Such unverified allegations of fact appearing in a memorandum do not properly constitute part of the record. Nor can this Court take judicial notice that all of petitioner's employees in the Philippines were dead or imprisoned during the Japanese occupation. Such a "fact" is neither "so notoriously true as not to be the subject of reasonable dispute, [n] or what is capable of immediate and accurate demonstration by resort to sources of indisputable accuracy easily accessible to men in the situation of members of the court." Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269, 273.

In the absence of anything in the record as to petitioner's ignorance of the existence of the claims, petitioner's state-

Respectfully submitted,

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ment of the question presented does not accurately present the issue before this Court. That issue is whether, on the pleadings, petitioner's claims are barred by Section 156 of the Judicial Code, 28 U.S.C. (1946 ed.) 262.

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